Supreme Court, U.S.
FILED

931500 MAR 16 1994

NO. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

DEWEY SOWDERS, WARDEN — PETITIONER

- versus -

CLAUDE EARN CARTER — RESPONDENT

PETITIONER'S APPENDIX

CHRIS GORMAN
ATTORNEY GENERAL

CAROL C. ULLERICH*
ASSISTANT ATTORNEY GENERAL
CRIMINAL APPELLATE DIVISION
P. O. BOX 2000
1024 CAPITAL CENTER DRIVE
FRANKFORT, KY 40602-2000
(502) 564-8308

COUNSEL FOR PETITIONER

*Attorney of Record for Petitioner

APPENDIX

Item	Page
Opinion, United States Court of Appeals for the Sixth Circuit, September 27, 1993 ----------	1-27
Order, United States Court of Appeals for the Sixth Circuit ----	28-30
Magistrate Judge's Report, United States District Court for the Western District of Kentucky, September 5, 1991 ----------	31-49
Order and Judgment, United States District Court for the Western District of Kentucky, October 31, 1991 ----------	50-51
Discussion Preceding Deposition of Charles Edward Elam, Jr., June 30, 1986 ----------	52-58

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 91-6419

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CLAUDE EARN CARTER, Petitioner-Appellant,	)	
v.	)	ON APPEAL from the United States District Court for the Western District of Kentucky
DEWEY SOWDERS, Warden, Northpoint Training Center, Respondent-Appellee.	)	

Decided and Filed September 27, 1993

Before: MERRITT, Chief Judge; and KEITH and SUHRHEINRICH, Circuit Judges.

MERRITT, Chief Judge. Claude Earn Carter appeals the denial of his petition for a writ of

habeas corpus pursuant to 28 U.S.C. §2254. Petitioner was convicted of possession of marijuana and trafficking in LSD. Central to his conviction was the testimony of Charles Elam, Jr., a paid police informant. Elam's video deposition was taken in the absence of both petitioner and his counsel, and the deposition was later admitted, over petitioner's objection, at trial. Because petitioner did not waive his constitutional rights under the Confrontation Clause to confront his accuser and subject his testimony to cross-examination, the deposition did not bear adequate indicia of reliability for admission at trial. We therefore reverse the district court and grant the petition.

I.

Charles Elam was a salaried narcotics agent with the Dyersburg, Tennessee Police Department, earning $150/week. According to Elam's

deposition testimony, Elam and Billy Driskell purchased marijuana and LSD from petitioner at a house trailer in Kentucky on November 3, 1985, and returned to Tennessee. Elam then took a group of Tennessee police officers to Kentucky and showed them the trailer where the drugs were purchased. The trailer was searched under warrant November 5, and Carter was arrested while working in the fields near the trailer. He denied ownership of marijuana found in the trailer, or that he had ever met Elam.

Carter was indicted by the Logan County, Kentucky, Grand Jury on December 27, 1985 for the drug offenses and for being a first degree persistent felony offender. He was arraigned January 17, 1986, and the trial was set for April 24 of that year. In preparation for trial, the Commonwealth moved March 4 to take a videotape deposition of Elam, giving no specific ground. A second motion was filed March 17,

this time alleging that a pretrial deposition was necessary, since the Commonwealth could not secure the attendance of Elam, a Tennessee resident, at Carter's trial in Kentucky. The court granted the motion. On April 14, the Commonwealth subpoenaed three Kentucky police officers to appear at Carter's trial ten days later. No subpoena was issued for Elam, nor were other efforts made to secure his attendance. On April 23, Carter's trial was continued from April 24 to September 25, 1986. The next day, the Commonwealth filed an ex parte petition, pursuant to Tennessee's Uniform Non-Resident Witness Act, to secure the attendance of Elam for the purpose of deposing him May 15, 1986. The court granted the petition within a day. There was no deposition on May 15. Instead, the Commonwealth filed another ex parte petition, this time pursuant to Oklahoma's Uniform Non-Resident Witness Act, to

secure Elam's presence in Kentucky to depose him June 30. The petition was granted the same day.

On June 5, the prosecutor wrote Carter's counsel, Louis Waller, notifying him of Elam's deposition on June 30 and stating that the "deposition will be read at [Carter's] trial" in September. According to Waller's statement at the June 30 deposition, he did not receive the notice until June 20. He then sent a letter to Carter, informing him of the deposition and stating "you may wish to be present." Waller received no response to the letter or to several subsequent phone calls made prior to the deposition. The trial court specifically found there was "no evidence that [Carter] had notice that he was suppose [sic] to be there."

The deposition was held as scheduled June 30. Waller appeared, but told the prosecutor that he could not effectively represent Carter without his presence. He further indicated that

he intended to withdraw from the case. He then left the deposition, but not before pointing out to the prosecutor that if Elam could be compelled to come to Kentucky for a deposition, there was no reason why he could not be present for trial in September. The prosecutor proceeded to depose Elam in the absence of petitioner and his counsel, and without any cross-examination. Two days after the deposition, the Commonwealth moved for a ruling on the admissibility of the deposition at trial in lieu of live testimony.

In preparation for the new September 25 trial date, the Commonwealth issued subpoenas for seven witnesses September 8. Elam was not among them. The court having granted Waller's motion to withdraw, new counsel was appointed for Carter September 9. The following day, the court continued the trial to January 5, 1987. Approximately one week later, Carter's new

counsel moved to quash Elam's deposition, on the grounds that Carter was denied his constitutional right to confront his accuser at the deposition. The motion was not denied until trial, almost four months later.

On December 18, 1986, less than three weeks prior to trial and more than five months after Elam's deposition, the prosecutor wrote Elam in Oklahoma notifying him of the new trial date and stating he "would like for [him] to come back to Kentucky in order to testify in person." On the same day, the prosecutor wrote the Logan Circuit Court Clerk, asking that a subpoena be issued for Elam. The letter to Elam was returned to the prosecutor because of an expired forwarding order, and the subpoena was issued bearing the same address, but was not served. The prosecutor made a one-minute phone call to Oklahoma December 26, a four-minute phone call to Union City, Tennessee December 31, and four

days prior to trial, on January 2, 1987, nine phone calls to Oklahoma lasting a total of sixteen minutes, in an effort to locate Elam.[1]

The trial commenced January 6, 1987. Immediately prior to trial, Carter's counsel stated on the record that although his motion to quash Elam's deposition had been argued, it had not been transcribed, and he reiterated his objections to its admission. He argued that the absence of Carter at Elam's deposition denied him his right to confront his accuser. He also emphasized to the court that the Commonwealth had used the Uniform Non-Resident Witness Act to procure Elam's attendance at his deposition, but had not made a similar effort to obtain his

---

[1] The phone bill listing these calls appeared in the prosecutor's Motion to Supplement, filed one month after Carter's trial. The identities of the parties called were not given.

presence at trial. The motion was overruled and the deposition was read as the Commonwealth's first witness. One of the police officers also testified concerning what Elam had told him prior to taking them to Kentucky to show them the trailer. The trial court overruled petitioner's objection to introduction of this hearsay testimony.

The jury found Carter guilty of possession of marijuana and trafficking in LSD, and of being a first degree persistent felony offender. Carter appealed. The Kentucky Supreme Court upheld his substantive convictions, but reversed his first degree persistent felony offender conviction due to insufficient evidence. Carter v. Commonwealth, 782 S.W.2d 597, 602 (Ky. 1989). After his petition for writ of certiorari to the United States Supreme Court was denied, 497 U. S. 1029 (1990), Carter filed a petition for writ of

habeas corpus in the district court, which was denied November 1, 1991. Carter filed a Motion for Certificate of Probable Cause in this Court March 10, 1992, which we granted April 15, 1992.

II.

Petitioner's claims on appeal all revolve around Elam's testimony. Petitioner asserts that the prosecutor's decision to continue Elam's deposition after the departure of petitioner's attorney denied him his Sixth Amendment right to counsel, and his right under the Fifth, Sixth and Fourteenth Amendments to be present at all critical stages of the proceeding against him. Petitioner further contends that the failure of the trial court to suppress the deposition at trial violated his Sixth Amendment right to confront his accuser, due both to the Commonwealth's lack of a good-faith effort to obtain Elam's presence at trial and due to the inherent unreliability of a deposition not

subjected to cross-examination. Finally, he asserts the admission of Elam's hearsay statements through the officer's testimony at trial was reversible, not harmless, error. We review de novo a district court's refusal to grant a habeas petition, and the district court's factual determinations are reviewed under the clearly erroneous standard. McCall v. Dutton, 863 F.2d 454, 459 (6th Cir. 1988), cert. denied, 490 U.S. 1029 (1989). We defer to state court findings if supported by the evidence. Lundy v. Campbell, 888 F.2d 467, 469 (6th Cir. 1989), cert. denied, 495 U.S. 950 (1990).

The Sixth Amendment on its face guarantees a criminal defendant the right "to be confronted with the witnesses against him." The Supreme Court has recognized that this language "comes to us on faded parchment ... with a lineage that traces back to the beginnings of Western culture." Coy v. Iowa, 487 U.S. 1012, 1015

(1988). "The Confrontation Clause provides two types of protection to the criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination." Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987). Both protections are crucial. "There is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" Coy, 487 U.S. at 1017 (quoting Pointer v. Texas, 380 U.S. 400, 404 (1965)). Similarly, the Confrontation Clause "forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth,'" California v. Green, 399 U.S. 149, 158 (1970) (quoting 5 J. Wigmore, Evidence § 1367, (3d ed. 1940)).

Against this backdrop, the absence of Carter's counsel during Elam's deposition

demands close scrutiny. As the Supreme Court stated in United States v. Cronic, 466 U.S. 648 (1984):

> [I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.... The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.

Id. at 659 & n. 25. In Green v. Arn, 809 F.2d 1257 (6th Cir.), vacated on other grounds, 484 U.S. 806 (1987), reinstated, 839 F.2d 300 (6th Cir. 1988), cert. denied, 488 U.S. 1034 (1989), this court had the opportunity to apply Cronic in a situation where defense counsel absented himself from petitioner's trial while the prosecution was presenting its case. Counsel for two other defendants in the case was present, and conducted cross-examination of the

state's first witness. Nevertheless, we found that petitioner's rights under the Confrontation Clause had been violated by the absence of her counsel during this critical stage of the proceeding:

> It is difficult to perceive a more critical stage of a trial than the taking of evidence on the defendant's guilt.... The absence of counsel during the taking of evidence on the defendant's guilt is prejudicial per se and justifies an automatic grant of the writ "without any opportunity for a harmless error inquiry." Siverson v. O'Leary, 764 F.2d 1208, 1217 [&n.6] (7th Cir. 1985).

Id. at 1263.

This case is similar to Green. It is undisputed that Elam's videotaped testimony was the sole evidence supporting Carter's conviction for the drug offenses of November 3, 1985. Although Lt. Ken Rieger was present to be cross-examined at trial, his information concerning the November 3 transactions came entirely from discussions with Elam. He did not

travel to Kentucky until November 5. The taping of the deposition was, for all practical purposes, the only time "evidence on the defendant's guilt" was taken. The unmitigated absence of cross-examination at this time meant that Elam's testimony was never subjected to "the crucible of meaningful adversarial testing," Cronic, 466 U.S. at 656. Of course, Green is distinguishable on its facts; the absence of Green's counsel occurred at trial, rather than at a pre-trial deposition. We do not explicitly extend today the holding in Green to cover pre-trial depositions as well as trials, however similar the impact on the defendant's Confrontation Clause rights. But our reasoning in Green supports our conclusion here that Elam's videotaped deposition was hearsay, and was improperly admitted under the

"unavailable witness" exception, Ky. R. Evid. 804 (Baldwin 1992).[2]

---

2 Ky. R. Evid. 804 states in relevant part:

Hearsay exceptions: declarant unavailable

> (a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant:
> ...
> (5) Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance by process or other reasonable means.
> ...
> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
> (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Ky. R. Evid. 804 is substantially identical to Fed. R. Evid. 804, lacking only the residual hearsay exceptions permitted by subsection (5) of the federal Rule. In Ohio v. Roberts, 448 U.S. 56 (1980), the Supreme Court set forth the standard to be applied in defending this hearsay exception against Confrontation Clause claims:

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Id. at 66. In Barber v. Page, 390 U.S. 719, 724-25 (1968), the Court articulated the burden which must be met by the Commonwealth to satisfy the "unavailability" prong of the foregoing test: "a witness is not 'unavailable' ... unless

the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." The test for review of compliance with this standard defies precise explication: "The lengths to which the prosecution must go to produce a witness ... is a question of reasonableness." Ohio v. Roberts, 448 U.S. at 74 (citing California v. Green, 399 U.S. at 189, n.22 (concurring opinion)).

We find it unnecessary to reach the issue of whether the Commonwealth's attempts to secure Elam's attendance at trial satisfy the good-faith effort test enunciated in Barber, however, because we hold that Elam's deposition, taken in violation of Carter's rights under the Confrontation Clause, could not satisfy the "other adequate indicia of reliability" standard imposed by the unavailable witness exception to the hearsay rule. Elam was not forced to confront Carter as he gave his deposition. He

was not cross-examined. These circumstances could not provide the trier of fact with "a satisfactory basis for evaluating the truth of the prior statement." Dutton v. Evans, 400 U.S. 74, 89 (1970).

The Commonwealth argues that the Ohio v. Roberts test is met in this case, because Elam's deposition was admitted under a "firmly rooted hearsay exception," 448 U.S. at 66, namely Ky. R. Crim. Proc. 7.20(1), which provides in relevant part:

> At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears: ... that the witness is out of the Commonwealth of Kentucky, unless it appears that the absence of the witness was procured by the party offering the deposition; or ... that the party offering the deposition had been unable to procure the attendance of the witness by subpoena.

(emphasis supplied). This argument is without merit. As the emphasized portion of the

preceding text shows, the rule governs production of evidence subject to the rules of evidence. Hearsay evidence from unavailable witnesses is governed by Ky. R. Evid. 804(b)(1), which includes the requirement that the party against whom the testimony is now offered had a prior "opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." But this is the very opportunity that was denied to Carter. The requirements of the exception are not met.

The Commonwealth contends that Carter waived his Sixth Amendment rights through his failure to attend the deposition after his attorney sent him written notice and tried to contact him several times by phone. It is not clear why this assertion, if true, would overcome the reliability problem with the deposition. Furthermore, we disagree with the premise. Waiver of the right to confront one's accuser is

evaluated according to the standards for waiving any constitutional right as enunciated in Johnson v. Zerbst, 304 U.S. 458, 464 (1938), and requires "an intentional relinquishment or abandonment of a known right or privilege." The right "may be waived only by voluntary and knowing action." Boyd v. Dutton, 405 U.S. 1, 2-3 (1972). The trial court found that there was no evidence that Carter ever received the letter from his attorney concerning the deposition, and that finding is presumed correct. 28 U.S.C. §2254(d). Furthermore, the letter, even if received, did not inform Carter of his constitutional right to attend, nor did it urge him to exercise that right ("you may wish to be present") (emphasis supplied). Most importantly, the letter did not provide Carter with any notice of the consequences if he failed to appear -- that his attorney would leave the deposition and permit the state's key witness to

be deposed without any cross-examination whatsoever. Although a waiver may be implied and not express, there must be evidence in the record to support that implication. This court's statement in Evans v. United States, 284 F.2d 393 (6th Cir. 1960) is directly applicable: "the record does not show that defendant knew or was advised of his rights. In order to constitute a waiver, there must be a voluntary relinquishment of a known right." Id. at 395. We find Carter did not personally waive his right to confront Elam.

The district court found that Carter nonetheless effected a waiver of this right through the actions of his attorney, who appeared for the deposition and then departed. We find this conclusion inconsistent with Zerbst. As the Second Circuit stated in United States v. Crutcher, 405 F.2d 239, 243 (2d Cir. 1968), cert. denied, 394 U.S. 908 (1969),

referring to defense counsel's decision to proceed with jury impanelling in the defendant's absence: "[E]ven assuming [counsel] had the authority to act as Payne's counsel, he would not have the ability to bind Payne to a decision of this type without obtaining Payne's consent." The Tenth Circuit came to a similar conclusion in Larson v. Tansy, 911 F.2d 392, 396 & n.2 (10th Cir. 1990):

> The record indicates defendant's counsel, and not defendant, waived defendant's right of presence at trial. The trial court never directly addressed defendant concerning his counsel's request to conduct the remainder of the trial in defendant's absence. We hold that defendant did not waive his right to be present.... Even if defense counsel could have validly waived defendant's right to be present for the conclusion of his trial, where defense counsel did not consult with defendant concerning the waiver and did not obtain defendant's consent, the waiver will not be binding on defendant.

We similarly find that, even if Waller's actions at the deposition could constitute a waiver of

the defendant's rights under the Confrontation Clause, the waiver would not bind Carter in the absence of a showing that he consented.[3] As

---

[3] The Kentucky Supreme Court found that "Carter's right to confront Elam at the deposition was waived" because "[a]mple notice of the deposition was provided to Carter's counsel ... There was no evidence that Carter, personally, had a legal reason why he was unable to attend, and no proof that his presence would have made a difference." Carter, 782 S.W.2d at 599. This obviously conflicts with our reading of Zerbst. Moreover, the Kentucky Supreme Court made statements in an opinion decided the same day, Dean v. Commonwealth, 777 S.W.2d 900 (Ky. 1989), that would lead to precisely the opposite result from that reached in Carter:

> We hold that because the right to be present and to confront is personal to the accused under Section 11 of the Kentucky Constitution, and more particularly under [Ky. R. Crim. Proc.] 7.12, only the defendant can waive this right. The waiver must be sufficiently clear "as to indicate a conscious intent." Powell v. Commonwealth, 346 S.W.2d 731, 734 (1961).... [A]ppellant's counsel waived appellant's right to be present at the depositions of the two prosecution witnesses. There is no

the Supreme Court stated in Faretta v. California, 422 U.S. 806, 819 (1975): "It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him' .... The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails."

We address finally the argument advanced by the Commonwealth that our ruling today will give

---

> indication in the record that it was appellant's conscious intent to waive this right and his consequent right to cross-examination. Counsel's waiver being ineffective, there was no waiver.... Appellant was not present; nor was he afforded the right to confront and cross-examine the witnesses called to testify against him.

Id at 903. We can discern no reason why a different standard was used in deciding Carter's fate.

every defendant's lawyer the power to obtain habeas relief for a client, merely by neglecting to inform the client of opportunities to confront his accusers. We rejected this argument in Martin v. Rose, 744 F.2d 1245 (1984), and see no reason to depart from our reasoning in that case:

> [W]e are unwilling to assume that members of the bar will cold-bloodedly adopt [such a] bizarre and irresponsible stratagem.... If such a tactic develops, the trial court must respond, but it is not helpless before an attorney's [tactics].... [T]he court's contempt power or the disciplinary mechanism of the bar may be appropriately invoked.

Id. at 1251-52.

III.

Carter had the right to confront Elam, his accuser. Denial of that right without a valid waiver rendered Elam's deposition unreliable for purposes of admissibility at trial over a hearsay objection. Because Carter's conviction

was based solely on Elam's testimony, the error was not harmless. We therefore REVERSE the decision of the district court, and GRANT the petition for writ of habeas corpus.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 91-6419

CLAUDE EARN CARTER, Petitioner-Appellant	)	
v.	)	O R D E R
DEWEY SOWDERS, WARDEN, NORTHPOINT TRAINING CENTER, Respondent-Appellee	)	

Before: MERRITT, Chief Judge; KEITH and SUHRHEINRICH, Circuit Judges

The Kentucky Attorney General's petition to rehear this habeas appeal is denied. The entire thrust of the petition is that petitioner Carter had notice of the deposition used in substitution for live testimony at Carter's criminal trial and that Carter knowingly waived his right of confrontation. This one point is repeated time and again for fifteen pages. The problem with this repeated point is that the

record demonstrates that it is simply factually inaccurate, as our previous opinion concludes, and as the state trial judge flatly found as a fact. The state trial judge found that there is no evidence that [Carter] failed to show for the deposition in this case. There is no evidence that he had notice he was supposed to be there. This Court is not empowered to set aside the reasonable factual findings of the Kentucky trial court, undisturbed by the state appellate courts. Thus the only significant evidence at Carter's criminal trial was a deposition of Carter's chief accuser, a deposition Carter had no notice of. Under the Confrontation Clause live testimony subject to cross-examination is required in order to convict in such a case.

Accordingly, the petition to rehear is DENIED.

ENTERED BY ORDER OF THE COURT

_____

Leonard Green, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

CLAUDE EARN CARTER
Plaintiff

v. No. 90-0197BG(M)

DEWEY SOWDERS, Warden
Defendant

MAGISTRATE JUDGE'S REPORT

This habeas corpus petition is before the Court on the respondent's motion to dismiss or, in the alternative, for summary judgment (docket no. 5) and the petitioner's cross-motion for summary judgment (docket no. 9). The petition requires an analysis of whether the petitioner was denied the right to confront one of the witnesses against him and whether he was denied the right to counsel at a critical stage of the proceeding against him. Because the petitioner was not denied his Sixth Amendment right to

confrontation and because he was represented by counsel, he is not entitled to the writ.

The petitioner was indicted in Logan County, Kentucky, on several drug charges. Following trial, a jury found him guilty of possession of more than eight ounces of marijuana and possession of LSD. The jury fixed the petitioner's sentence on the LSD charge at the maximum of ten years and on the marijuana charge at the maximum of five years. The jury also found the petitioner guilty of being a first degree persistent felony offender and enhanced each of his sentences to thirteen years.

The petitioner challenges his convictions of possession of marijuana and possession of LSD. He claims that the convictions are constitutionally invalid because they were based upon evidence from a witness whom he was denied the right to confront. Specifically, he claims that a video deposition of a police informant

was wrongfully admitted at his trial because there was no showing that the deponent was "unavailable" for trial and the deposition lacked any "indicia of reliability" because the deponent was not tested by cross-examination. Thus, he claims, his right to confrontation of a witness against him as guaranteed by the Sixth Amendment to the United States Constitution was violated.

The testimony of which the petitioner complains was that of Charles Elam. The petitioner labels Elam a "paid police informant." The respondent labels him a "salaried narcotics agent with the Dyersburg Tennessee Police Department."

Prior to trial, the Commonwealth had deposed Elam. The deposition was necessary, according to the Commonwealth, because Elam was a Tennessee resident and the Commonwealth lacked the power to insure his attendance at the

petitioner's trial in Kentucky. The petitioner's counsel appeared at the deposition, but the petitioner did not. His attorney stated that he had written to the petitioner on June 20, 1986, advising him, "you may wish to be present," and had made other efforts to contact the petitioner, to no avail.

Counsel stated at the deposition that he had moved the Court to withdraw as the petitioner's counsel and did not plan to remain for the deposition because, without the petitioner's presence, he could not effectively represent him. After the petitioner's counsel departed, the Commonwealth deposed Mr. Elam. Because neither the petitioner nor his counsel was present, Mr. Elam was not cross-examined.

The video deposition was introduced at trial over the petitioner's objection. In essence, Elam's testimony was that he met the petitioner at a trailer where approximately 100 pounds of

marijuana was located, the petitioner "fronted" Elam and another person ten bags of marijuana, and he sold Elam eight "hits" of LSD.

ANALYSIS

The petitioner argues that he was denied the right to confront Elam at the deposition. The deposition was, therefore, inadmissible at trial and his conviction based upon the deposition, accordingly, was constitutionally tainted.

The Sixth Amendment's Confrontation Clause, made applicable to the States through the Fourteenth Amendment, Pointer v. Texas, 380 US 400, 403-405, 13 L.Ed.2d 923, 85 S.Ct. 1065 (1965), provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." Nearly one hundred years ago the Supreme Court stated that:

> The primary object of the [Confrontation Clause of the Sixth Amendment] ... was to prevent

> depositions or ex parte affidavits ... being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Mattox v. United States, 156 US 237, 242-243, 39 L.Ed.2d 409, 411, 15 S.Ct. 337 (1895).

The Confrontation Clause restricts the admissibility of evidence in two ways, both of which the petitioner claims were violated at his trial. First, if the prosecution does not produce at trial the declarant whose statement it wishes to use against the defendant (thus denying the defendant the right to confront him) it must demonstrate the "unavailability" of the declarant. If the declarant is not produced and the prosecution fails to show that he is unavailable, the evidence is not admissible.

Barber v. Page, 390 U.S. 719, 20 L.Ed.2d 255, 88 S.Ct. 1318 (1968).

Second, even upon showing that the absent witness is "unavailable", the evidence is admissible only if it bears "adequate indicia of reliability." Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597 (1980).

If Elam was not "unavailable" or if the assertions in his deposition did not bear "adequate indicia of reliability", the evidence violated the Confrontation Clause. The magistrate judge will first address whether the prosecution demonstrated that Elam was "unavailable."

The Kentucky Supreme Court, in addressing whether the prosecution made a good faith effort to locate Elam for attendance at trial, did not recite the prosecution's efforts. Rather, the court held that such a determination is "addressed to the sound discretion of the trial

court." The court held that the trial court had not abused its discretion in finding that Elam was "unavailable" for trial.

Contrary to the respondent's argument, this finding is not entitled to a presumption of correctness under 28 U.S.C. §2254(d). Sumner v. Mata, 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982). It is, instead, a mixed question of fact and law that is to be reviewed de novo. Clark v. Jago, 676 F.2d 1099, 1110 n.15 (6th Cir. 1982).

The petitioner states in his summary judgment motion, and the respondent does not dispute, that the prosecution made the following attempts to make Elam "available" for trial. On December 18, 1986, nineteen days prior to trial, the prosecutor sent a letter to Elam in Oklahoma notifying him of the January 6, 1987, trial date and stating he "would like for [him] to come back to Kentucky in order to testify in

person." (TR I 108). The letter was returned to the prosecutor on December 23 indicating Elam's forwarding order had expired. Also on December 18, 1986, the prosecutor wrote to the Logan Circuit Court Clerk asking him to issue a subpoena for Elam. (TR I 146-147). The subpoena was issued on December 24, 1986, and mailed to the same Oklahoma address. The prosecutor made telephone calls to Little Caesar's Bar in Oklahoma City where Elam allegedly worked, to Little Caesar's main office, to other stores in the Oklahoma City area, and to the Union City, Tennessee Police Department in an attempt to locate Elam. (TR I 105-107, 145; TR II 78-88).

On April 14, 1986, the Commonwealth subpoenaed three Kentucky police officers to appear at the April 24 trial. No subpoena was issued for Elam, nor was any other effort made

to apprise him of the trial or request his presence.

On April 23, 1986, the trial was continued until September 25, 1986. On April 24, 1986, the Commonwealth filed an ex parte petition, pursuant to Tennessee's Uniform Non-Resident Witness Act, to secure the attendance of Elam for purposes of deposing him on May 15, 1986. The petition was granted.

On May 15, 1986, the Commonwealth filed another ex parte petition, this time pursuant to Oklahoma's Uniform Non-Resident Witness Act, to secure Elam's presence in Kentucky for a deposition on June 30, 1986. That petition was also granted.

Additionally, the Kentucky Supreme Court found that:

> Elam was asked on deposition where he would be 'come September of this year when this case comes to trial', to which he replied, vaguely, 'Honestly I

can't say, but I hope to be back in Oklahoma.'
Carter v. Commonwealth, Ky., 782 S.W.2d 597, 599 (1990).

The petitioner argues that the prosecution did not make a good-faith effort to procure Elam to testify at trial. If the prosecution had intended to produce Elam at trial, the petitioner argues, it would have obtained a subpoena for him when the subpoenas for other witnesses were issued and it would have subpoenaed him for trial at the time that it subpoenaed him for deposition. He also argues that the prosecution's failure to use the Kentucky Uniform Non-Resident Witness Act, KRS 421.250, to procure Elam for trial further supports the allegation that the prosecution did not make a good faith effort to produce Elam.

It does appear that the prosecution initially may have been concerned more with deposing Elam and presenting his deposition

attrial rather than assuring that Elam would personally appear. This may have been because the prosecution feared that it would not be able to locate Elam in order to subpoena him at the time of trial or it may have been to accommodate Elam's apparent desire that he not have to return to Kentucky because he was afraid of the petitioner. The question is, however, whether there was a good faith effort to locate Elam for trial. The magistrate judge finds that there was. The efforts made are noted above. That little effort was made prior to the earlier trial dates does not detract from the attempts to locate Elam prior to the ultimate date on which the trial was held. The petitioner's arguments that the prosecution did not subpoena Elam for trial and did not utililze the non-resident witness act are not persuasive. In order to do either, the prosecution would have to know Elam's location. The prosecution

asserted that it did not know where to find Elam and there is no evidence in contradiction. Further, the prosecution could not have served upon Elam at the deposition a subpoena to appear at trial because such service is prohibited by KRS 421.260 (a person is not subject to subpoena for trial when he was present in the jurisdiction only by reason of a court order to attend and testify by deposition). Having found that Elam was unavailable, we turn to whether his testimony through deposition bore "adequate indicia of reliability."

The Kentucky Supreme Court did not directly address whether the testimony met the "adequate indicia of reliability." Rather, it relied on RCr 7.20 which "authorizes the use of a deposition in appropriate circumstances relating to unavailability, as specified therein." Carter, id. at 600. As noted above, the "adequate indicia of reliability" issue is an

integral part of determining whether the requirements of the confrontation clause were met. The issue was presented for the Kentucky Court's consideration. That the Court did not address it does not constitute a failure to exhaust his remedies as to that issue. We, therefore, will consider the issue.

As previously noted, the deposition was admissible at trial only if the evidence presented bore "adequate indicia of reliability." Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597 (1980). The petitioner argues that there was no indicia of reliability because the deposition was hearsay evidence and because the deposition was improperly conducted without either himself or his attorney present.

The deposition was not hearsay evidence. Rather, it was properly admissible pursuant to FRCP 804 "Hearsay Exceptions; Declarant

Unavailable." The rule provides in pertinent part:

> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Here, Elam's deposition was taken in the course of the proceeding against the petitioner and the petitioner, through his attorney, had the opportunity to cross examine him. The petitioner argues that there is no evidence that he personally had notice of the deposition and that he could not, accordingly, have waived his right to examine Elam when he did not know that the deposition was to take place. He argues

that "clearly" due to his absence at the deposition, he was denied his right of an opportunity to cross examine Elam.

The petitioner's arguments miss the mark. His attorney was present at the deposition. He stated that he had written the petitioner advising him that he "may wish to be present" at the deposition. The petitioner does not state whether he received the letter of his attorney. Instead, he argues that there is no evidence in the record that he did. Indeed, the trial court found that there was no such evidence and that finding is presumed correct. 28 USC 2254(d). Whether the petitioner received the notice is not dispositive of the matter. His attorney was present at the deposition. The petitioner argues that "once the prosecutor was on notice that Petitioner's counsel intended to withdraw, he should have postponed the deposition until it was clear that Petitioner was represented by

counsel." This is the basis for the petitioner's assertion that he was denied counsel at a critical stage of the proceedings. Although the petitioner's counsel indicated that he had moved to withdraw from representing the petitioner, the motion had not been ruled upon by the Court. Until his motion was granted, it was clear that he was, nonetheless, the petitioner's attorney. As the petitioner's attorney, he had the opportunity to cross examine Elam or to waive cross examination on behalf of the petitioner. The attorney did not request that the deposition be postponed nor did he object to its occurrence. The opportunity to challenge Elam's testimony was there. The plaintiff, through his attorney, chose not to take advantage of it.

In Idaho v. Wright, 497 U.S. ___, 110 S.Ct. 3139, 3146, 111 L.Ed.2d 638 (1990), the Supreme Court held that the reliability of evidence

presented by an unavailable witness can be inferred without more where the evidence falls within a firmly rooted hearsay exception. The evidence produced at trial through the video deposition of Elam falls within FRCP 803(b)(1). It was properly admitted at trial as an exception to hearsay.

RECOMMENDATION

The Magistrate Judge RECOMMENDS that the petition for writ of habeas corpus be DENIED.

Date: August 25, 1991

/s/W. David King
W. DAVID KING
United States Magistrate Judge

NOTICE

Pursuant to Title 28 USC §636 and Rule 6(e) of the Federal Rules of Civil Procedure, the parties shall have thirteen (13) days from the date of service to file written objections to the foregoing report with the Clerk of the Court. A copy of the objections shall be served

on the undersigned at P.O. Box 826, Paducah, Kentucky 42002-0826. Failure of a party to file timely objections shall constitute a waiver of the right to appeal by that party. Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985), reh. den. 474 U.S. 1111, 106 S.Ct. 899, 88 L.Ed.2d 933 (1986).

Date of Service: September 5, 1991

/s/ W. David King
W. DAVID KING
United States Magistrate Judge

Copies to
Ms. Namkin
Ms. Ullerich

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

CLAUDE EARN CARTER
Plaintiff

v. No. 90-0197BG(M)

DEWEY SOWDERS, Warden
Defendant

ORDER AND JUDGMENT

This matter having been considered by U.S. Magistrate Judge W. David King; it appearing that the Magistrate Judge has filed his report and that written objections have been filed to the Magistrate Judge's report; the Court having considered de novo those portions of the Magistrate Judge's report to which objection is made; the Court having determined that the Magistrate Judge's report should be accepted in whole and the Findings of Fact and Conclusions

of Law should be fully incorporated by reference herein; and the Court being sufficiently advised.

It is hereby ORDERED and ADJUDGED:

1. The petition for writ of habeas corpus is DENIED.

2. This is a final and appealable Order and there is no just cause for delay.

Date: October 31, 1991

/s/Ronald E. Meredith
RONALD E. MEREDITH
Judge, U.S. District Court

Copy to
Namkin
Ullerich
Judge King

The deposition of CHARLES EDWARD ELAM, JR., taken pursuant to notice heretofore filed, in the offices of Jesse L. Riley, Jr., Attorney at Law, Kirkpatrick Building, Russellville, Logan County, Kentucky, on Monday, June 30, 1986, at approximately 10:15 A.M., and to be used in accordance with the Kentucky Rules of Civil Procedure

*** *** *** ***

A P P E A R A N C E S

For the Plaintiff:	Jesse L. Riley, Jr. Kirkpatrick Building Russellville, KY 42276 (502) 726-7554
For the Defendant:	Louis M. Waller P.O. Box 32 139 West Fourth Street Russellville, KY 42276
Also Present:	Benny Bowles and Donna Riley

*** *** *** ***

MR. RILEY: This is the deposition of Charles Edward Elam, Jr., being taken pursuant

to order of Logan Circuit Court entered on or about April 2nd, 1986, which has been marked as Plaintiff's Exhibit 1 and pursuant to notice to take depositions which has been marked Plaintiff's Exhibit Number 2; which notice shows it was forwarded to attorney for Claud Carter and attorney for the other defendant, namely Mr. Louis Waller and Mr. T.A. Noe.

Mr. Waller, I understand that you like, would like to make a statement at this time since Mr. Carter is not present.

MR. WALLER: Yes, I would. I was apprised of the possibility that this deposition would take place on, or about June 20th. At that time I had matters scheduled for District Court, and I was advised by the Commonwealth Attorney that the deposition would take place. I told him that I would try to rearrange schedule in District Court. Commonwealth Attorney at that time was uncertain as to whether or not Mr. Elam

would be present. I told him I would try to be present, and I have done that this morning by restructuring my schedule in District Court.

But my problem is that I have been unable to locate Mr. Carter. Now, shortly after receiving notice from Mr. Riley that the deposition was to take place and on June 20th, 1986, I addressed the letter to Mr. Claud E. Carter, Route 1, Oldstead, Kentucky. Mr. Carter has no telephone to my knowledge.

The deposition for Charles E. Elam is tentatively scheduled for Jesse Riley's office at 9:30 a.m., Monday, June 30, 1986. Jesse seems uncertain that Elam will show, although he has sent an airplane ticket to Colorado. I have a District Court matter that same morning but will plan to work around it. You may wish to be present.

Now, I called or yesterday I had a discussion with Mr. Carter's sister. And her

name is Mrs. Parker. And when I talked to Mrs. Parker she gave me a number where I might be able to reach Mr. Carter. I told her that I was anxious to reach with him to talk with her about this matter. She gave me the number of one Brenda Houchens, H-O-U-C-H-E-N-S. That number is 726-7994. I tried that number several times. I received no answer. I appeared this morning prepared for the deposition but was aware of the fact that Mr. Carter was not here. And I have tried to reach Mr. Carter at that number, 726-7994.

At Mr. Riley's suggestion I interrupted the line with the operator, advised the operator that it was an emergency. The operator informed me at about ten o'clock that the telephone was out of order, which I assume could probably be established whether it is or is not.

But I have served notice of withdrawl [sic] from the case for the reason that I'm not able

to sit through the deposition and ask the questions that need to be asked and have information from Mr. Clark -- Carter that would be essential for proper representation. I have delivered that to Mr. Riley. So I do not plan to attend the deposition. I have no reluctance to attend. It's simply that I cannot effectively represent Mr. Carter's interest without him being present. And I don't know where he is, whether he had a truck breakdown or some other problem that prevented him from being present.

MR. RILEY: Mr. Waller, I understand that you as Mr. Carter's attorney and continue to be his attorney until you are allowed to withdraw are not going to stay for the deposition? Is that correct?

MR. WALLER: Yes, sir. That's correct.

MR. RILEY: I also believe that in your letter to Mr. Carter you advised him that he could attend if he wanted to.

MR. WALLER: I said, "You may wish to be present." My intention was that when he received that letter that we would discuss the matter further, but we have not been able to do so. No summons or other court process has been issued to compell his attendance, and his attendance is discretionary with him at this point in time.

MR. RILEY: And you are not going to stay while we take Mr. Elam's deposition?

MR. WALLER: I don't believe that it would be fair to Mr. Carter to do that, because I would not be able to effectively ask questions and to interrogate the witness on cross examination.

I previously asked that the witness be present for trial, and we have a trial date in September. And it would seem that if he could be here for this television presentation that he could also be present for the trial at nine

o'clock on September 25th. But I don't know whether or not he could attend that. But it would seem that he could have as well have attended the trial as the deposition.

MR. RILEY: At this time would the court reporter please swear Mr. Elam?

MR. WALLER: Okay. Let the record show that I'm departing for the reasons as I have previously stated.

MR. RILEY: Better take your mike off, Mr. Waller.

MR. WALLER: Okay. Thank you.